160 US 355

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

NO. 648.

GEORGE PIERCE AND JOHN PIERCE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED JUNE 18, 1895.

(15938.)

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in the case of—

UNITED STATES *vs.* GEORGE PIERCE AND JOHN PIERCE.	Indictment for murder. No. 110.

1 *Indictment.*

UNITED STATES OF AMERICA,
Western district of Arkansas:

In the circuit court, Feb. term, A. D. 1895.

UNITED STATES *vs.* GEORGE PIERCE AND JAMES PIERCE.	Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That George Pierce and James Pierce are white men, and not Indians, on the 15th day of January, A. D. 1895, at the Cherokee Nation in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one William Vandever, a white man and not an Indian, then and there being feloniously, wilfully, and of their malice aforethought, did make an assault; and that the said George Pierce and James Pierce, with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun they, the said George Pierce and James Pierce, in their hands then and there had and held, then and there feloniously, wilfully, and of their malice aforethought, did discharge and shoot off to, against, and upon the said William Vandever, and that the said George Pierce and James Pierce, with the leaden bullet aforesaid, out of the gun aforesaid then and there, by force of the gunpowder aforesaid, by the said George Pierce and James Pierce discharged and shot off as aforesaid, then and there feloniously, wilfully, and of their malice aforethought, did strike, penetrate, and wound him, the same William Vandever, in and upon the head of him,

2 the said William Vandever, giving to him, the said William Vandever, then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said George Pierce and James Pierce in and upon the head of him, the said William Vandever, one mortal wound, of the depth of four inches and of the breadth of half an inch; of which said mortal wound he, the said William Vandever, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said George Pierce and James Pierce *him* the said William Vandever in the manner and by the means afore-

said, feloniously, wilfully, and of their malice aforethought did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

2nd count. The grand jurors of the United States of America duly selected, empaneled, and sworn, and charged, to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That George Pierce and James Pierce, white men, and not Indians, on the 15th day of Jan., A. D. 1895, at the Cherokee Nation, in the Indian country, with the western district of Arkansas aforesaid, with force and arms, in and upon the body of one William Vandever, a white man and not an Indian, then and there being feloniously, wilfully, and of their malice aforethought, did make an assault; and that the said George Pierce and James Pierce, with a certain blunt instrument, a more particular description of said blunt instrument being to the said grand jurors unknown, which said blunt instrument they, the said George Pierce and James Pierce, in their hands then and there had and held, then and there feloniously, wilfully, and of their malice aforethought, did strike, beat, and beat to, against, and upon the said William Vandever, and that the said George Pierce and James Pierce, with the blunt instrument aforesaid, used as aforesaid then and there by force of the blunt instrument by the said George Pierce and James Pierce used and wielded as aforesaid, then and there feloniously, wilfully, and of their malice aforethought, did strike, penetrate, and wound him, the said William Vandever, in and upon the right side of the head of him, the said William Vandever, giving to him, the said William Vandever, then and there with the blunt instrument aforesaid, so as aforesaid used and wielded by the said George Pierce and James Pierce in and upon the right side of the head of him, the said William Vandever, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said William Vandever, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said George Pierce and James Pierce, him, the said William Vandever, in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 110. United States vs. George Pierce and James Pierce. Murder. A true bill. L. H. Southmayd, foreman. Witnesses: Andrew A. Brown, Wagoner, I. T.; B. F. West, Ft. Gibson, I. T.; Ed Poteet, Wagoner, I. T.; Moses Crittenden, Wagoner, I. T.; J. C. Humbert, Ft. Gibson, I. T.; C. Graves, Gravel Point, Mo. Filed in open court Feb. 14, 1895. Stephen Wheeler, clerk. By I. M. Dodge, D. C.

In the circuit court of the United States for the western district of Arkansas, Feb. term, 1895, Thursday morning, 8½ o'clock, Feb. 14, 1894.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* GEORGE PIERCE AND JAMES PIERCE.	Indictment for murder. No. 110.

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendants, in custody of the marshal and by their attorney, and having jointly had hearing of said indictment, and it being demanded of them separately concerning said indictment above specified and charged upon them how they would acquit themselves thereof, they say, each for himself, they are not guilty as charged in said indictment, and put themselves upon the country.

FRIDAY, *Feb. 15, 1895.*

(Caption omitted.)

On this day come the defendants, in custody of the marshal, and make known to the court that they are destitute of means and wholly unable to employ counsel to defend them in this cause. Whereupon, by order of the court, J. C. Byers, esq., was appointed to defend them in this cause. Thereupon defendants' counsel filed a demurrer to the 2nd count of the indictment in this cause.

THURSDAY, *Feb. 28, 1895.*

(Caption omitted.)

On this day come on to be heard the demurrer to the 2nd count of the indictment in this cause, filed February 15, 1895. The court, being well and sufficiently advised in the premises, doth overrule said demurrer, to which ruling of the court the defendants, by their counsel, at the time excepted. The defendants, by their counsel, move the court, orally, to require the plaintiff to elect upon which count of the indictment in this cause it will proceed. The court, after being well and sufficiently advised in the premises, doth overrule said motion, to which ruling of the court the defendants, by their counsel, at the time excepted.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Reed, esq., attorney for the western district of Arkansas, and come the said defendants, in custody of the marshal and by their attorney, J. C. Byers, esq., and it appearing from the returns of the marshal that the said defendants have each been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause, and that they have also been served with a full and complete list of the panel of petit jurors and alternates as selected and drawn by the jury commissioners for the present term of this court, more than two entire

days heretofore; and having heretofore had hearing of said indictment, and each for himself pleaded not guilty, it is on motion of plaintiff by its attorney ordered by the court that a jury come to try the issue joined. Whereupon, after counsel for both plaintiff and defendant has exercised, in the presence of the defendants, their full right of challenge under the law, the following jurors were selected for the trial of this cause: John C. Armistead, John F. Baker, Asa B. Clark, Luther A. Coger, James C. Dooley, Jas. M. Kaylor, Chas. C. Mulvaney, Richard McEachin, James T. Reed, Wm. J. Seamans, Thomas Willis, Lewis Worthen.

6 Twelve good and qualified electors of the district aforesaid, duly selected, empaneled and sworn to try the issue joined and a true verdict rendered according to the law and the evidence, and after hearing a statement of the case by counsel and a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court. And it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

FRIDAY, *March 1, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendants in custody of the marshal and by their attorney, J. C. Byers, esq., and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to-wit: John C. Armistead, John F. Baker, Asa B. Clark, Luther A. Coger, James C. Dooley, Jas. M. Kaylor, Chas. C. Mulvaney, Richard McEachin, James T. Reed, Wm. J. Seamans, Thomas Willis, Lewis Worthen, who took their seats in the jury box, and after hearing the remainder of the evidence and the argument of counsel, and receiving the charge of the court, retired in charge of the sworn bailiff aforesaid to consider of their verdict, and after a short time returned into court the following verdict, to wit:

"We, the jury, find the defendants, George Pierce and John Pierce, guilty of murder as charged in the first count of the within indictment.

(Signed) "J. C. ARMISTEAD, *Foreman.*"

7 It having been developed by the testimony of the defendant who was indicted and pleaded to the indictment as James Pierce that his true name is John Pierce, the jury therefore returned the verdict against him as John Pierce.

Whereupon, by order of the court, the jury was discharged from the further consideration of the case, and said defendants were remanded to the custody of the marshal to await final sentence.

THURSDAY, *March 7, 1895.*

(Caption omitted.)

On this day come the said defendants by their attorney and file their motion to set aside the verdict of the jury and for a new trial in this cause.

MAY TERM, 1895, WEDNESDAY, *June 5, 1895.*

On this day come on to be heard the motion heretofore filed to set aside the verdict of the jury and for a new trial in this cause, and the court being fully advised in the premises, doth overrule the same, to which action of the court in overruling said motion defendants at the time excepted.

8 WEDNESDAY, *June 5th, 1895.*

(Caption omitted.)

On motion of Jas. E. Read, esq., attorney for the western district of Arkansas, the said defendant George Pierce was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause on the 1st day of March, 1895, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said George Pierce be deemed, taken, and adjudged guilty of the crime of murder; and it is ordered by the court that the said marshal of the district aforesaid cause the said George Pierce to be taken hence, and him, the said George Pierce, safely and securely keep, from the date hereof, until Thursday, the 1st day of August, A. D. 1895; and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said George Pierce to be taken to some convenient place within this district to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon on Thursday, the said 1st day of August, in the year of our Lord one thousand eight hundred and ninety-five, cause the said George Pierce to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefore. And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

9 THURSDAY, *June 6th, 1895.*

(Caption omitted.)

On motion of Jas. E. Read, esq., attorney for the western district of Arkansas, the said defendant, John Pierce, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause, on the 1st day of March, 1895, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said John Pierce be deemed, taken, and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of the district aforesaid cause the said John Pierce to be taken hence, and him, the said John Pierce, safely and securely keep, from the date hereof, until Thursday the 1st day of August, A. D. 1895, and on that day, and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said John Pierce to be taken to some convenient place within this district to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon on Thursday the said 1st day of August, in the year of our Lord one thousand eight hundred and ninety-five, cause the said John Pierce to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended and that they have execution therefor. And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

10 THURSDAY, *June 6, 1895.*

(Caption omitted.)

On this day come the said defendants, George and John Pierce, by their attorney, J. C. Byers, esq., and tender their bill of exceptions, and ask that the same be signed and made a part of the record in this cause, which is accordingly done; also at the same time file their assignment of errors herein.

MONDAY, *June 10, 1895.*

(Caption omitted.)

On this day come the said defendants, George and John Pierce, by their attorney, J. C. Byers, esq., and file their petition for writ of error to the Supreme Court of the United States, together with their petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

SATURDAY, *June 15, 1895.*

(Caption omitted.)

On this day comes the clerk of this court and makes known to the court that a writ of error taking this case to the Supreme Court of the United States has been issued by the clerk.

It is therefore hereby ordered by the court that execution of sentences heretofore pronounced in this cause be stayed pending the action of the Supreme Court.

193 *Bill of exceptions.*

In the circuit court.

UNITED STATES	
vs.	Murder.
GEORGE PIERCE & JOHN PIERCE.	

[Note by the clerk: The bill of exceptions is omitted in printing by reason of the following request and statement of the Attorney-General, viz:]

195 DEPARTMENT OF JUSTICE,
Washington, D. C., October 30, 1895.

J. H. McKENNEY, Esq.,
Clerk U. S. Supreme Court.

DEAR SIR: I return herewith the original transcript of record in the case of George Pierce et al. v. The United States, No. 648 of this term. I find on examination that nearly the whole of the bill of exceptions is absolutely immaterial. I therefore request on behalf of the United States, which is obliged to pay for what printing is done in the case, that you omit the entire bill of exceptions (pp. 11 to 176, inclusive), and insert instead thereof the enclosed statement.

Very truly, yours,

EDWARD B. WHITNEY,
Assistant Attorney-General.

196 [Practically the whole of the bill of exceptions is immaterial upon this writ of error. There is no exception to the charge of the court, and there are only two exceptions in any part of the bill, namely, the one hereinafter set forth in Mr. Brown's testimony, and the exception to the denial of the motion for a new trial. The bill of exceptions is therefore not printed, but the following short statement substituted:]

Andrew Brown, the first witness on behalf of the Government, testified that he lived ten miles southeast of Wagoner, Cherokee Nation; that on Monday evening, January 14, 1895, he saw the two defendants, with another man, close to his place; that they were traveling with a mule team and covered wagon, with a gray mare and colt following.

Witness further testified that before daylight the next morning he saw the same outfit except that there was no third man with defendants; that he went for his nearest neighbor, Mr. West, and with him searched the place where defendants had camped, finding blood scattered all around; that Mr. West picked up a blanket and something like a pint of blood ran out of it.

The bill of exceptions here proceeds as follows (MS. page 16):

He just dropped it and said: "Brown, what kind of blood is that?"

Mr. BYRES (of counsel for defendant). Never mind that.

196 The COURT. I think that is competent. It is a verbal fact that occurred at the time they were looking just as much as what they saw.

Mr. BYRES (of counsel for defendant). We just reserve an exception.

The WITNESS. I said, "I don't know what kind of blood it is. It is blood." He says: "Maybe they have killed one of my hogs." I says, "We will see."

Witness further testified that he and Mr. West found the body of a man; that they then followed defendants' trail and found and identified them in a wagon yard at Tahlequah.

The bill of exceptions then proceeds as follows (MS., pages 19–21):

Q. What conversation, if any, did you have with them?

A. Well, after we arrested them——

Mr. BYERS (of counsel for defendant). If the court please, I would object to any admissions or confessions that they might have made there unless the district attorney lays first the foundation by showing that they were not influenced by the presence of the officers, or something of the sort, because if it was anything made in the hope of reward or fear of punishment it would not be proper.

The COURT. The mere presence of officers is not an influence.

The DISTRICT ATTORNEY. I think the facts and circumstances would have to be detailed in order to enable the court to judge whether the evidence is competent or not.

The COURT. Yes; you may ask him if there were any threats made.

The DISTRICT ATTORNEY. Were there any threats made by the officers or anybody else against these men?

A. No, sir.

Q. Was there any inducement held out to them to make a statement—any promise of any kind?

A. No, sir; they were asked to state why that they left this partner of theirs with them there; and I think, if I mistake not, it is that youngest fellow that is sitting on the right from here; he said, "If we killed him, you prove it," was the words that he used.

Q. You say there were no threats made against them there at all?

A. No, sir.

Q. Or any promises made to them?

A. No, sir.

106 Q. Now, tell just exactly what occurred when you first arrested them, what they said, and what was said in their presence?

A. Well, that is about the most of it. Of course, there was several other things that might have been said, but that is all I impressed on my mind there of what he said. He just said when we asked him——

Q. Was that the first thing you did—ask him about this matter—or did you tell him you had arrested him?

A. Mr. Lamb told him he would arrest him——

Q. What did they say to that?

A. He wanted to know what for. He says, "We will tell you after a while," and got them both cuffed together, and then went to talking to them about it——

Q. What was the next said after they were handcuffed together?

A. Mr. Lamb asked them where they camped that night, and they said they came back over there on Grand River, and he says, "You have travelled pretty hard to-day, haven't you?" and he says, "No, we haven't travelled very hard." He says, "You left camp pretty soon, didn't you?"

and he says, "Yes, sir; tolerable early." "How came it you left your partner over there?" or something of that kind. I think that is about the words. I won't be positive that was the exact words, and they said they didn't know nothing about it. I said, "He was killed over there," and they says, "If we killed him, you prove it," was the expression that that man on the right-hand side there said.

Q. Did they make any other statements there at all?

A. No, sir; not right there. We moved them into the store there——

Q. Did you ask them their names?

A. Yes, sir; they said, "That is for us to know, and you to find out," I believe was the expression that was used.

Q. Refused to tell their names?

A. Yes, sir; they never told us their names at all.

Witness further testified that the dead man had been shot in the forehead and also hit on the head with a hammer.

The balance of this witness' testimony is immaterial for the purposes of this writ of error, as is the testimony of the other witnesses for the prosecution. The identity of the two defendants and of the deceased, William Vandever, was established by the witness C. Groves.

10f Defendants testified in their own behalf that Vandever left them in Kansas about two weeks before their arrest, giving them his mare and colt to take back to his family; that the man who was traveling with them on the Monday aforesaid was one Voschel; that he left them on Monday evening; that the dead man was neither Vandever nor Voschel.

Nothing material to this bill of exceptions is to be found in the defendants' evidence, in the rebuttal evidence, or in the charge of the court. The motion to compel an election between the counts of the indictment does not appear to have been renewed upon the trial.

A motion for a new trial was made and overruled. It was based upon the grounds that the verdict was contrary to law and to the evidence; that the court had erred in its charge and in various rulings upon evidence and in denying the motion to compel an election. Defendants' counsel excepted to the denial of the motion.

177 *Assignment of errors.*

UNITED STATES	
vs.	Murder.
GEORGE PIERCE AND JOHN PIERCE.	

In the circuit court.

The appellants aver that there is error in the proceedings and judgment in this cause in this:

1st. The court erred in overruling the demurrer to the second count in the indictment.

2nd. The court erred in overruling the defendants' motion to compel the Government to elect upon which count of the indictment it relied for conviction.

3rd. The court erred in admitting the conversation of witnesses Brown and West, in the absence of the defendants, as the same tended to prejudice the jury against them.

4th. The court erred in admitting the statements made by the defendants when they were under arrest and handcuffed, and at a time when they were too much scared as to be conscious of what they did say.

5th. The court erred in its declarations of the law to the jury.

6th. The court erred in overruling the motion of the defendants for a new trial.

Wherefore the appellants pray that the judgment be reversed.

GEORGE PIERCE.
JOHN PIERCE.

(Endorsed on back:) Filed June 6th, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

178 *Petition for writ of error.*

UNITED STATES
vs. } Murder.
JOHN PIERCE AND GEORGE PIERCE. }

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioners, George Pierce and John Pierce, respectfully represent that at the Feb. term of said court, 1895, they were convicted on an indictment charging them with the crime of murder, and that the said court has pronounced judgment and sentence of death upon your petitioners on the verdict of the jury convicting them as aforesaid.

Your petitioners allege that in the record and proceedings in the trial in said cause there is great and manifest error to the prejudice and great damage of your petitioners.

They therefore pray that a writ of error from the Supreme Court of the United States be issued by you, under the seal of the said circuit court, in said cause removing said cause and record therein to the Supreme Court, in order that the same may be there examined, and that if error be found that the judgment and sentence of the court against them therein may be reversed.

GEORGE PIERCE and
JOHN PIERCE.
By J. C. BYERS, *their attorney.*

(Endorsed on back:) Filed in open court June 10th, 1895. S. Wheeler, clerk.

179 *Poverty affidavit.*

In the circuit court of the United States for the western district of Arkansas, May term, 1895.

UNITED STATES
vs. } Murder.
GEORGE PIERCE AND JOHN PIERCE. }

Comes now the defendants in the above-entitled cause and pray that they may be permitted to prosecute their appeal as poor persons for the following reasons, viz:

That they are in indigent circumstances and are not worth over ten dollars above their wearing apparel.

G. M. PIERCE.
JOHN PIERCE.

Sworn to and subscribed before me this 8th day of June, 1895.

STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

(Endorsed on back:) Filed in open court June 10, 1895. S. Wheeler, clerk.

180 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court for the western district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The United States, pltf., and George Pierce and John Pierce, a manifest error hath happened, to the great damage of the said George and John Pierce, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12 day of June, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western District of Arkansas.

Allowed by—

Justice of the Supreme Court of the United States.

181 UNITED STATES OF AMERICA, *ss:*

To Jas. F. Read, U. S. dist. atty. for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of *of* the United States for the western district of Arkansas, wherein George Pierce and John Pierce, plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff' in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable I. C. Parker, U. S. district judge for the western district of Arkansas, this 12 day of June, in the year of our Lord one thousand eight hundred and ninety-five.

I. C. PARKER,
U. S. District Judge, Holding Circuit Court.

On this day of , in the year of our Lord one thousand eight hundred and ninety , personally appeared before me, the subscriber, , and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I hereby acknowledge service of the within citation and waive service by an officer.

JAS. F. READ,
U. S. Dist. Attorney for the Western Dist. of Ark.

182 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record and proceedings in the case of U. S. *vs.* Geo. and John Pierce, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 12 day of June, A. D. 1895.

[SEAL.] STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Indorsed on cover:) Case No. 15938. Term No. 648. George Pierce and John Pierce, plaintiffs in error, vs. The United States. W. Arkansas. C. C. U. S. Filed June 18, 1895.

(15938.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 648.

GEORGE PIERCE AND JOHN PIERCE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

* * * * * * *

112 *Testimony introduced by defense.*

J. R. PIERCE, having been duly sworn in his own behalf, was examined in chief by J. C. Byres, esq., testifying as follows, to wit:

Question. What is your name?
Answer. J. R. Pierce.
Q. What is the "J" for?
A. John.

Mr. BYRES (of counsel for defendant). I notice, if the court please, he is indicted under the name of James Pierce.

The COURT. He plead by the name of James; that is my recollection. That does not make any difference.

Mr. BYRES (of counsel for defendants). No; I just made mention of it.

Q. How old are you?
A. Twenty-nine years old.
Q. Where were you raised?
A. In Texas County, Missouri.
Q. When did you leave Missouri?
A. Along about the 20th of November, I think it was.
Q. Where did you leave Missouri to go to?
A. In the Territory.
Q. In whose company did you leave?
A. My brother's, there, and Willie Vandever's.
Q. How long did you know Vandever?
A. I knew him all my life.
Q. How did you come to leave there with Vandever?

A. He wanted to go with us, and we told him he could go.

Q. What was he going for?

A. I don't know; hunting work, or to hunt a location, or something or another. I never heard him say.

Q. What business was he in, if anything?

113 A. He wasn't in any that I know of.

Q. What did he have in the way of property when he and you left, or when you started?

A. He had a mare and colt.

Q. Do you know anything about any money he had; and if so, what?

A. No, sir; I knew he had some money, but I don't know how much.

Q. What did you have in the way of property or money?

A. I had a span of mules and wagon, and I borrowed five dollars from Vandever, and had five dollars of my own.

Q. When did you borrow five dollars from Vandever?

A. It was two or three days before we started from Missouri.

Q. When, if ever, did you pay it back?

A. I never paid it back. He gave it to me for hauling him out there—for hauling his tricks and outfit.

Q. Then you didn't borrow it of him if he gave it to you.

A. I borrowed it at the time, and after we got out he said he didn't want it back.

Q. When you left Missouri, now just go ahead and tell the jury where all you went to, where you stopped, and what you done at different places?

A. We stopped in the edge of the Territory about 8 miles from the Missouri line.

Q. Where at?

A. On Spring River.

Q. What, if anything, did you do there?

A. We worked at a sawmill, cut and hauled saw logs to the mill.

Q. For what?

A. Five dollars a thousand.

Q. How much money did you earn there?

A. I don't know just exactly. We worked a little over a month, me and my brother there.

114 Q. What did you do with your earnings?

A. We have got a part of it; the most of it.

Q. Where is it?

A. This man right here has got it (referring to the jailer).

Q. Where did you leave Mr. Vandever?

A. I left him up close to Coffeyville, Kansas, or he left us there.

Q. Under what circumstances did he and you separate?

A. He got into some trouble there and he was aiming to go on anyway, he said, to Texas.

Q. What was the trouble he got into?

A. He shot a man's dog, and the man told him he was going to have him arrested, and he just pulled out. He was in about five miles of Coffeyville, I guess.

Q. Where did he pull out for? Did he state where he was going?

A. He pulled out for California from where we were. He was going on to Texas he said.

Q. How does it come he didn't have his mare and colt with him?

A. He didn't want to take them, he said. He said he wanted to go through on the train; that he might go on to California.

Q. What, if any, instructions did he leave with you with reference to his mare and colt?

A. Told us to take them back to his family; gave us ten dollars to support them on until we got them back.

Q. When was that?

A. I don't know just exactly when it was, what day; it was about two or three weeks—two weeks before this man had us arrested.

Q. What was that?

A. He gave us ten dollars to take his mare and colt back.

Q. When was that; do you remember?

A. No, sir; I don't remember just what time it was.

115 Q. Fix the time as near as you can?

A. It was about two weeks before these men had us arrested.

Q. And that was whereabouts?

A. Up close to Coffeyville, Kansas.

Q. Have you ever seen him since?

A. No, sir; I never have.

Q. What were the feelin's between you and he at the time you separated, friendly or otherwise?

A. We were friendly; just as friendly as we were ever in our lives.

Q. Where did you go from the time he left you?

A. We came right on down the road, right down by Oolagah and Claremore.

Q. At what place, if any, did you stop?

A. We never stopped any place at all until we got down to Grand River.

Q. Do you know Mr. Humberd?

A. Yes, sir; I seen him.

Q. Did you stop at his place for awhile?

A. Yes, sir.

Q. How long did you stop there?

A. We got there on Saturday and staid until Monday.

Q. Who was in your company at that time?

A. A man got with us up the other side of there about three or four miles.

Q. Who was that man?

A. He said his name was Voschel.

Q. How long was he with you?

A. He staid with us until Monday evening.

Q. What did he do while he was with you, if anything?

A. He never done anything.

Q. How did he travel with you?

A. He just travelled with us; sometimes he would ride in the wagon, and sometimes he would ride the mare.

Q. Did he ever do anything, or pretend to do anything, when he was with you?

116 A. He talked about trading horses some; seemed to be quite a horse trader.

Q. How long did he stay with you?

A. He staid with us from Saturday until Monday evening.

Q. Where did you see him last?

A. He left us on Grand River.

Q. Did he leave you on the night of this killing?

A. Yes, sir; on the night they claimed that the man was killed, Monday evening.

Q. Was it him that was with you when you went into camp that night, or was there but two of you went in there?

A. He was with us when we went in camp.

Q. Now, you say his name was Voschel?

A. Yes, sir; that is what he said his name was.

Q. At what time did you go into camp?

A. A little before sundown, I guess.

Q. At what time did he leave you?

A. He left about sundown.

Q. Where was he going to?

A. He said he was going up to a tie camp at Whiskey Ford.

Q. How far was that from where you were?

A. About a mile and a half, I guess.

Q. How long was it before you moved from there?

A. We started the next morning.

Q. What time in the morning?

A. About daylight, I guess. Just about the break of day.

Q. Was that your usual 'our of starting, or was it any earlier than usual?

A. Yes, sir; it was some little bit earlier. Once in a while we started soon.

Q. What occasioned you starting earlier that morning than usual?

A. We got up and got ready, and we thought we would start.

117 Q. Did you hear a gun discharged that morning?

A. No, sir; I didn't hear any gun.

Q. What arms, if any, did you have in your possession?

A. We had a shotgun and a Winchester, Smith & Wesson pistol.

Q. Were there any arms discharged around your camp; and if so, what?

A. No, sir.

Q. Did you eat breakfast that morning before you left?

A. No, sir.

Q. When you left there where did you go to?

A. We went to Tahlequah.

Q. How far was your camp there from Tahlequah?

A. I don't know exactly how far it was. It was about 20 or 25 miles.

Q. Do you know Mr. Andrew Brown?

A. Yes, sir; when I see him is all.

Q. Did you meet him that morning?

A. No, sir; we seen him at his house.

Q. I mean to say, you saw him.

A. Yes, sir; I don't know who it was; we seen a man.

Q. You asked him the direction to Whiskey Ford, I believe?

A. Yes, sir.

Q. Did you go to Whiskey Ford or not?

A. Yes, sir; we went right across there.

Q. Passed on through there and went to Tahlequah?

A. Yes, sir.

Q. Where were you going to? What was your objective point, if any special place?

A. No, sir; we were just starting back towards home.

Q. Where were you designing to go ultimately; home, or
118 were you still hunting work?

A. Yes, sir; if we had found work we would have worked some more, but we had started back towards home.

Q. At what time did you first hear of this killing?

A. I never heard of it until I was arrested.

Q. What time was that?

A. It was about 8 o'clock in the night, I guess.

Q. Who arrested you, do you know?

A. There was eight or ten of them; Lamb and Clarke and some others.

Q. What was the first thing they said to you when they came up?

A. We were in the wagon fixing to go to bed, and they all came up and threw their guns up in the wagon and told us to crawl out of there, and we just crawled out there and asked them what was this for and they told us.

Q. What did they tell you?

A. They told us they had found a man dead back close to where we were camped.

Q. What was said about you and your brother, if anything?

A. They said they thought we had done it, and handcuffed us and searched us.

Q. They took you back with them, then, did they?

A. Yes, sir; staid all night there in Tahlequah, and the next morning they took us back to Wagoner.

Q. Which, if either of you, told Mr. Lamb if you had killed him God damn you, let's see you prove it?

A. It wasn't me, and I don't recollect of my brother saying anything abo't it.

Q. Do you know how much money you had at the time you were arrested; altogether?

A. We had about fifty dollars.

Q. Can you describe that money?

A. Yes, sir.

Q. What kind of pieces was it?

A. About ten dollars of it was in silver. There was a twenty-
119 dollar bill, ten-dollar bill, and two fives.

Q. How had you got that money?

A. We had worked for it.

Q. Who had you worked for?

A. Worked for some men out there at the sawmill by the name of Wenfro and Morrow. They had given us the money except ten dollars of it.

Cross-examination by the DISTRICT ATTORNEY:

Q. Where do Wenfrow and Morrow live?

A. On Spring River.

Q. Whereabouts?

A. Out close to the Missouri line.

Q. In the Territory?

A. Yes, sir.

Q. How long did you work for them?

A. A little over a month.

Q. How much did you earn there?

A. I don't know just exactly how much. About 60 dollars, I think—fifty-five or sixty.

Q. What was Vandever doing while you were all working there?

A. He off-beared at the mill.

Q. He was working too, was he?

A. Yes, sir.

Q. Did he make anything?

A. He made a little bit. He only got six bits a day.

Q. How much did you get?

A. We worked by the thousand.

Q. How many thousand did you make?

A. About ten thousand, I think.

Q. You got five dollars a thousand?

A. Yes, sir.

Q. Where did you go from there?

A. We went from there to Vinita, and from Vinita to Coffeyville.

Q. What time in the month did you get to Coffeyville?

A. I don't recollect what time it was now.

120 Q. What time did you get to Wenfrow and Morrow's?

A. It was about the first of December or right the last of November.

Q. How long did you stay there?

A. Until right away after New Years.

Q. And then you went to Coffeyville?

A. Yes, sir.

Q. How long did it take you to go from there to Coffeyville?

A. I don't recollect how many days we were.

Q. About how far is it?

A. I don't know that.

Q. What time was it when you got to Coffeyville? Can you tell what time in the month?

A. No, sir; I could not tell you what time it was.

Q. How long did you stay there at Coffeyville?

A. We never went into Coffeyville at all. We went in about five miles of Coffeyville.

Q. About how far from Coffeyville was it that Vandever left you?

A. About five miles of Coffeyville, and we turned off and struck the railroad down this side.

Q. What was the reason he left?

A. He shot a dog.

Q. What did he shoot him with?

A. With a revolver.

Q. What kind of a revolver?

A. .45 Colt's.

Q. What time in the day was it that he shot the dog?

A. It was about 2 o'clock, I guess, or three.

Q. Where was the owner of the dog at the time?

A. He was right there. He was a moving man. He was camped on the road.

Q. And he threatened to have Vandever arrested, did he?

A. Yes, sir; what he said. Vandever was going to leave us anyhow when we got to Coffeyville, and he just pulled out.

Q. Where was he going?

A. He said he was going to Texas, and he might go on to California.

121 Q. How was he going?

A. Going on the train.

Q. What property did Vandever have along?

A. A mare and colt.

Q. What else?

A. Nothing at all. Well, a saddle was all.

Q. What kind of clothing?

A. Well, he had a blue suit of clothes, which he left with us, and he had a new suit that he took with him.

Q. How many suits did he have altogether?

A. Two that was any account that he took. He bought him a new suit at Vinita.

Q. That suit he left with you all was a new suit, was it not?

A. No, sir; he had it several years.

Q. He just wore one suit of clothes, then?

A. Yes, sir.

Q. Just took one suit of clothes?

A. He had not time to take anything.

Q. He was going on the train, wasn't he?

A. Yes, sir.

Q. He could have made a bundle out of his clothes very easily and taken them that way?

A. He could, but I guess he did not think about it, he was scared so bad.

Q. About what?

A. About killing that dog.

Q. When he left you did he turn around and go back to Coffeyville to take the train?

A. He went on to Coffeyville; he didn't turn around.

Q. Just went off without anything except the clothes he had on his back?

A. Yes, sir; that is all.

Q. Did he have any money?

A. Yes, sir.

Q. How much?

A. I don't know how much he had.

Q. How much money did he leave home with?

A. I don't know that, either.
Q. Did he let your brother have any money?
A. He let him have five dollars when he left home.
122 Q. Did your brother pay him back?
A. Yes, sir.
Q. He let you have five and your brother have five when he left home?
A. Yes, sir.
Q. How did he happen to leave his pocketbook with you?
A. He never left any pocketbook.
Q. How many pocketbooks did you all have?
A. I had three.
Q. What kind?
A. I had a red pocketbook and two purses.
Q. What were you doing with the two purses?
A. My sister give me one before I left Missouri.
Q. How many did your brother have?
A. One.
Q. You had three and your brother one?
A. Yes, sir.
Q. How did Vandever happen to leave his knife with you?
A. He never left no knife with us.
Q. Where did you get Vandever's boots?
A. Found them. They were not his boots.
Q. Where did you find them?
A. Up the other side of Oolagah.
Q. Where?
A. Near the road.
Q. What number of boot did Vandever wear?
A. I don't know exactly what number he did wear.
Q. These boots that you found would about fit him, wouldn't they?
A. I don't know whether they would or not?
Q. How long was it after you got to Coffeyville before you came down there by old man Brown's place on Grand River? How long after you left Coffeyville until you got down there?
A. About two weeks; right along there somewhere.
Q. What day were you arrested?
A. About the 16th, I think—15th or 16th of January.
Q. Then you had camped at old man Brown's the night of the 13th, had you?
123 A. Yes, I guess it was; I don't recollect what day it was.
Q. They took you back there to the camping ground, didn't they?
A. Yes, sir.
Q. Was that the same place you camped?
A. Yes, sir; I think it was.
Q. What time did you get there that night to camp?
A. It was some time before sundown; I don't remember just exactly.
Q. An hour or two before sun?
A. I guess it was half an hour by sun.
Q. You state it was 4 o'clock next morning when you left?
A. Staid there until about da'light next morning, when we left.

Q. You say there were no shots fired around there at all?
A. I never heard any.
Q. If there had been a shot fired you would have heard it?
A. It looks like it.
Q. If there had been a man killed around there you would have known of it, too, wouldn't you?
A. It looks like it.
Q. What direction did this man go that left you?
A. He went to Whiskey Ford, about the tie camp, he said.
Q. What kind of a looking man was he?
A. I could not tell you. He wasn't a very large man. He had right smart beard on his face and whiskers.
Q. How long were his whiskers?
A. I guess about two inches or two and a half.
Q. What kind of a mustache?
A. Kind of light mustache—red, like.
Q. What kind of hair?
A. I don't recollect now.
Q. What did you mean by telling these men that the man who staid all night with you was a older man than the man there?
124 A. I never told anyone that.
Q. You saw that dead man, did you?
A. Yes, sir.
Q. Was he the man that was in your camp?
A. No, sir; he wasn't.
Q. He didn't look like him?
A. No, sir; he didn't look anything like him.
Q. Nothing at all?
A. No, sir.
Q. Did that man look like William Vandever?
A. No, sir; it did not.
Q. It wasn't William Vandever?
A. No, sir.
Q. It didn't look anything like him?
A. No, sir; not at all.
Q. How long have you known Mr. C. Groves, who testified here?
A. I don't know, sir; I have known him quite a while.
Q. How long has he known William Vandever?
A. I don't know; he has known him a good bit, I guess.
Q. The man that was dead there didn't look like the man that had been in your camp the night before?
A. No, sir.
Q. Were you there when this boy stopped there and talked about trading horses?
A. Yes, sir.
Q. You heard the conversation?
A. Yes, sir.
Q. That man was there at that time?
A. Yes, sir.
Q. This man that was with you was with you at Humberds Ferry, was he?

A. Yes, sir; he got with us on Saturday.
Q. What property did he have?
A. He didn't have anything.
Q. How do you know he was a horse trader, then?
A. He said he was.
Q. What was he doing with you?
A. He was just staying with us. He got with us, and we told him where we were going.
Q. What did you say his name was?
A. Voschel.
125 Q. How do you spell it?
A. I don't know, sir.
Q. Where was he from?
A. I don't know; he never said where he was from.
Q. Where did he say he was going?
A. He said he was going to the tie works.
Q. When you left there that morning you went up there by old man Brown's, as he described, did you?
A. Yes, sir.
Q. And you had that conversation with him and went on from there to Tahlequah?
A. Yes, sir.
Q. And you were in Tahlequah when you were arrested?
A. Yes, sir.
Q. Why didn't you tell your names there?
A. Them fellows made us mad.
Q. How?
A. Cuffed us around, drawed their pistol, and said they would hit us over the head with it, and things like that—this here Clarke that was along.
Q. What made you tell them there had not been any man with you at your camp for?
A. I never told them that.
Q. What time in the night was it that man left your camp?
A. After sundown.
Q. Why didn't he stay all night with you?
A. I don't know; he said he wanted to go on up there to see if he could get any work.
Q. He had no grip?
A. He had nothing.
Q. Nothing to eat with him?
A. Nothing, only what he had on.
Q. Did he eat supper with you?
A. No, sir.
Q. He went right on?
A. Yes, sir; we made up a fire and he went right on ahead.
126 Q. Did you take breakfast next morning?
A. Yes, sir.
Q. Where?
A. Right there at the camp.

Q. You say you had a shotgun—was it a shotgun or a musket you had with you?

A. An old musket.

Q. You shot shot then, didn't you?

A. Yes, sir.

Q. You had blood on you, didn't you?

A. I don't know whether there was or not. There may have been. We had been killing some rabbits. I killed one on Saturday.

Q. Where?

A. Down there at Grand River, where we were camped.

Q. That was the last rabbit you had killed, was it?

A. And we killed one Sunday, too, I believe.

Q. Where?

A. Down there at the same place. We killed one Sunday evening.

Q. How did the blood get on your brother's shirt?

A. I don't know, unless it was from his nose. His nose had been bleeding that morning.

Q. Where did you get that hammer?

A. Got it in Missouri.

Q. What part of Missouri?

A. Texas County.

Q. Did you have it when you started out?

A. Yes, sir.

Q. How do you account for the blood being on that blanket down there at the camp?

A. I don't know. I didn't know there was any blanket there or any blood there. There was none there when we left.

Q. There was no blood about the camp when you left?

A. No, sir; no blood at all, sir.

Q. Did you burn anything before you left there?

A. No, sir.

Q. How do you account for that blood being on the sack?

A. I don't know, unless it was from the game we had on the wagon, or something like that.

127 Q. How long had you known William Vandever?

A. All my life.

Q. You were boys raised together?

A. Yes, sir; ever since I can recollect I have known him.

Redirect examination by Mr. J. C. BYRES:

Q. Did you ever see that hat before (referring to hat introduced by the Government as being hat with holes in it found on person of deceased)?

A. Yes, sir; I saw that down there where I saw the corpse.

Q. Did you ever see it before you saw the dead man?

A. No, sir; I never did.

Q. You say that that blood on the sack was probably from game you had in the wagon?

A. Yes, sir; I suppose it was.

Q. What game did you have in the wagon?

A. We had some rabbits. We killed rabbits. There was game all along the road that we travelled. Birds, and one thing and another.

(Witness excused.)

128 GEORGE PIERCE, being duly sworn in his own behalf, was examined in chief by J. G. BYRES, Esq., and testified as follows, to wit:

Question. What is your name?

Answer. George Pierce.

Q. How old are you?

A. Twenty-one.

Q. Where were you raised?

A. In Missouri?

Q. When did you leave Missouri?

A. I left Missouri on about the 20th or 21st, I think, of November—the 21st.

Q. In company with whom did you leave?

A. My brother there and William Vandever.

Q. Where did you go to?

A. We started for the Territory.

Q. For what purpose?

A. To hunt work.

Q. What property did you have when you left?

A. I didn't have any myself. My brother there had a team and wagon, and Vandever had a mare and colt.

Q. Who is Vandever?

A. That is the fellow that left with us—William Vandever.

Q. Did you all start together?

A. Yes, sir.

Q. Where was Vandever going?

A. He was going to the Territory, too.

Q. Are you a married man?

A. No, sir.

Q. Is your brother married?

A. He has been.

Q. Where is his wife?

A. She is dead.

Q. Is Vandever married?

A. Yes, sir.

Q. Where is his family?

A. His wife and one child are here, and the balance of them, I reckon, are in Missouri.

129 Q. Did he leave them there when he left with you?

A. Yes, sir.

Q. What property did he have?

A. He had a mare and colt.

Q. What money did he have, do you know?

A. No, sir; I don't.

Q. Did you borrow any money from him?

A. Yes, sir; I borrowed five dollars.

Q. Did you ever pay it back?

A. Yes, sir.

Q. When did you pay it back?

A. Just before he left us.

Q. What was the first work you got after you got to the Territory?

A. At a sawmill on Spring River.

Q. Whose sawmill?
A. Morrow and Wenfrow, I believe, is their names.
Q. How long did you work there?
A. Worked there about a month, or may be a little more.
Q. What pay did you get while you were working there?
A. We were putting in saw logs, and we got five dollars a thousand.
Q. How much money did you earn there, do you know?
A. No, sir; not exactly. About 50 or 55 or $60.00; somewhere along there.
Q. Did he pay you?
A. Yes, sir.
Q. Where did you go from there?
A. I don't remember just when.
Q. Where did you go to from there, I asked?
A. We went to Coffeyville, Kansas, or up——
Q. Was Vandever with you at that time?
A. Yes, sir.
Q. Working at the mill at that time?
A. Yes, sir.
Q. Did he leave there with you?
A. Yes, sir.
Q. How long did he stay with you?
A. I don't know how long it was.

Q. How long was it before you were arrested that you and
130 Vandever separated?

A. It was about two weeks, I guess.
Q. Where did you separate at?
A. Up close to Coffeyville; about five miles of Coffeyville.
Q. Where did he go to?
A. He started to Texas, and said maybe he would go to California; he didn't know.
Q. Under what circumstances did he leave you?
A. On account of killing a dog.
Q. Whereabouts did he leave you?
A. Up there close to Coffeyville.
Q. What property, if any, did he leave in your possession?
A. He left a mare, colt, and saddle.
Q. What, if any, instructionss did he give you as to what disposition you should make of that property?
A. He told us to take it and take care of it and take it back to his family.
Q. Where did you next see Vandever?
A. I never saw him any more since he left us up there.
Q. When were arrested?
A. On the 15th or 16th.
Q. Where?
A. Tahlequah.
Q. By whom?
A. By Charley Lamb and Bobb Calrke, and Ed. Reed, I believe was the three.
Q. Where were you taken when you were arrested?

A. Back to Wagoner.

Q. Did they take you to any place where you had camped before or anything?

A. Yes, sir; took us back down to where they claimed we killed that man.

Q. Did you see the dead man?

A. Yes, sir.

Q. Who was it?

A. I don't know; I never saw him before.

Q. Do you know whether it was William Vandever?

A. No, sir; I know he wasn't.

131 Q. Who was this man that was with you?

A. He said his name was Voschel.

Q. Where did he first meet you?

A. There above Ft. Gibson.

Q. How long did he stay with you?

A. From Saturday until Monday evening.

Q. Was he with you at Humberd's?

A. Yes, sir; at Ft. Gibson.

Q. His name, you say, was Voschel?

A. That is what he said his name was.

Q. What was he doing?

A. Not anything. He just got with us, and staid with us from Saturday until Monday evening.

Q. *With* time did he leave you Monday evening?

A. Along just about sundown, or a little after.

Q. Where did he go to, do you know?

A. No. He said he was going to Whiskey Ford to the tie gang to see if he could get work.

Q. What time did you go into that camp there?

A. About half an hour by sun, I guess. Maybe not quite so much.

Q. What time did you strike camp? That is, when did you leave the next morning?

A. It was just before daylight. Day was breaking, I guess.

Q. Did he stay until after supper?

A. No, sir.

Q. Did he leave as soon as you went in camp?

A. He staid a little while after we started a fire.

Q. Did you cook and eat your breakfast before you left the next morning?

A. Yes, sir.

Q. Where did you go then?

A. We struck out for Whiskey Ford, and was going back towards home, and went to Tahlequah.

Q. Was that in the direction of home?

A. Well, I don't know whether it was or not, hardly.

132 Q. Where was your objective point? Where were you expecting to go to?

A. We were kind of hunting work, if we could find work. We were going back home if we could not.

Q. What property did you have when you were arrested?

A. We had a span of mules and a mare and colt.
Q. How much money did you have?
A. We had about $50.00, I reckon.
Q. What kind of money was it?
A. There was about ten dollars in silver, and the balance in greenback.
Q. Where had you gotten that money?
A. We had worked for it.
Q. These witnesses say you had some blood on your clothes. How about that?
A. I think they found a little on my shirt, but my nose had been bleeding the morning before.
Q. What occasioned your nose to bleed?
A. It generally bleeds very often.
Q. Was it you that spoke to Mr. Lamb when he said they were arresting you for killing the man, that they would have to prove it?
A. I don't remember saying anything of that sort.
Q. Study a minute, and if you didn't say that, what did you say?
A. I don't remember just what I did say.
Q. What were you doing at the time they arrested you?
A. We were fixing to go to bed. We were fixing our beds.
Q. What was the first intimation you had that anyone was pursuing you? What was the first thing you discovered?
A. Eight or ten men rode around the wagon and told us to climb down from there.
Q. What did they do? Pull their guns on you?
A. Yes, sir; they had all their guns out, and we surrendered.
Q. Handcuff you?
A. Yes, sir.
133 Q. Did they ask you any questions before they handcuffed you, or was this afterwards?
A. I think they handcuffed us first.
Q. You say that this man they took you to see was not William Vandever?
A. No, sir.
Q. Was he this man Voschel?
A. No, sir.
Q. Did you ever see the man before?
A. No, sir; I never did.
Q. About what size man was Vandever?
A. His weight, I think, would run from 140 to 150 or 145; right along up there, I think.
Q. What clothes did he have with you when he left you?
A. He had a new suit of clothes that he bought in Vinita.
Q. What did he do with his other clothes?
A. He just left them in the wagon.
Q. How did he come to leave them with you?
A. He said he didn't want to be bothered with them.

Cross-examination by the DISTRICT ATTORNEY:

Q. He left his shirts with you, didn't he?
A. He left one of them.

Q. The only clothes he took with him was what he had on his back?
A. Yes, sir.
Q. Going to Texas, and from there to California?
A. He said that is where he was going. He didn't know where he would stop, he said.
Q. Where was he going to take the train?
A. At Coffeyville, I think, is where he said he was going to take it.
Q. How did he happen to shoot this dog?
A. Well, I don't know. Just thought he would shoot it, I reckon, to see it fall over.

134 Q. Where was the dog when he shot it?
A. It was at a fellow' camp.
Q. What direction were you going then—towards or from Coffeyville?
A. We were going kind of from Coffeyville.
Q. The man was camped there, then, was he?
A. Yes, sir.
Q. What time in the day was it that he shot the dog?
A. It was about two o'clock, I think.
Q. A man camped about two o'clock? What was the man doing there?
A. Eating dinner, I reckon. Travelled late and eat dinner.
Q. How far beyond the camp did you all go before he left you?
A. We never went but a little piece, and he pulled out; the man said he was going to have him arrested.
Q. Pulled out and went back to Coffeyville?
A. Yes, sir.
Q. If the man was going to have him arrested there is where he would go to get an officer, wouldn't he?
A. I don't know, sir.
Q. And so he pulled out and went right back to Coffeyville. Now, after you all camped there that night you were going to Whiskey Ford, were you?
A. Yes, sir.
Q. What were you going to Whiskey Ford for?
A. We were going through that way.
Q. Where were you going? Where had you started to?
A. There wasn't any particular place.
Q. What were you looking for?
A. We were looking for work.
Q. There was a tie camp at Whiskey Ford, wasn't there?
A. Yes, sir; I reckon there was.
Q. That is where the other man was going, to Whiskey Ford?
A. Yes, sir.

Q. Why didn't you tell him to wait and go with you next
135 morning?
A. I don't know; he just pulled out.
Q. He said he was going to Whiskey Ford?
A. Yes, sir.
Q. He pulled out an' left you to come on next day? Did you stop at Whiskey Ford?
A. No, sir.
Q. Why didn't you?

A. We didn't have any occasion to stop.
Q. Did you look for a tie camp there?
A. Yes, sir.
Q. Saw men making ties?
A. Yes, sir; but we could not get any job cutting.
Q. And you just kept on going?
A. Yes, sir.
(Witness excused.)

* * * * * * *

142 In the circuit court of the United States within and for the western district of Arkansas.—February term, A. D. 1895.

UNITED STATES
vs.
GEORGE PIERCE, JAMES PIERCE. } Murder.

Charge of the court.

Delivered March 1st, A. D. 1895, 4.30 p. m.

PARKER, J.

Gentlemen, the defendants in this case, George Pierce and John Pierce (indicted as James Pierce), are charged with the crime of murder. There are two counts in this indictment, but it is only intended for one charge. The first count charges that these defendants committed that crime because they took the lives of William Vandever, a white man, and not an Indian, by shooting him with a gun, and that they did that act willfully and with malice aforethought. If that is true, that makes the crime of murder. The second count charges the killing of the same man, but it charges that the death was caused by the use of a blunt instrument, a more particular description of which said blunt instrument being to the grand jury unknown, and that the said unknown blunt instrument was used willfully and with malice aforethought.

143 It becomes necessary for the court to tell you what propositions are involved in this charge in order that you may go to the evidence to see whether they exist or not. If you find their existence beyond a reasonable doubt the first general proposition involved in this charge is made out—that is, that William Vandever was killed in such a way as to make his crime murder. That, of course, does not make a case against the defendants, because the evidence must show with equal certainty that they were the authors of that crime; that they did the act which resulted in his death. You are first to go to the testimony to find whether William Vandever is dead. You take the evidence bearing upon that proposition—the evidence going to show the identity of the dead man who was the living William Vandever. If that satisfies your minds as reasonable men to that degree of certainty called proof beyond a reasonable doubt, or establishment of a proposition beyond a reasonable doubt, you take it as established. Secondly, that he died because he had inflicted upon him either a gun-shot wound, as described in the first count of the indictment, or because he received a wound with some blunt instrument,

which was unknown to the grand jury, and which caused his death. If you are satisfied upon the proposition that the gunshot wounds were sufficient to produce the death of William Vandever, and you are satisfied of the other propositions that I will give you presently, entering into this charge, your finding would be appropriately under the first count in the indictment. But if you are not satisfied that the gunshot wound produced his death, but it was produced by some blunt instrument, your appropriate finding, provided you are satisfied beyond a reasonable doubt that all the elements entering into the crime have been established, would be under the second count of the indictment. Third, you are to
144 find that this violence was inflicted by these defendants. In this connection it becomes necessary to tell you how more than one person may become guilty of the same crime; how they may be responsible, under the law, for the same criminal act. Any number of persons, the law says, may be responsible for the same crime. Certain things must exist. They must bear a certain relation to the criminal act to make them responsible. If they do not bear that relation as shown by the proof, then they are not responsible. Now, what is it that is necessary to put a party in such an attitude as that he is responsible for a crime? Well, if a crime has been committed, such as is charged in this case, for example, and a man with his own hand commits that crime in the manner charged, of course he *is* responsible for it. If while he is doing it another is present at the place of the crime, and in any way wilfully aids, assists, counsels, advises, or abets the crime, it is his act as well as the act of the man who strikes the fatal blow. A man may manifest his assistance or his aid by doing anything that directly and immediately leads to the deadly result. He may do that by striking a blow himself, or firing a shot himself, or he may aid by giving assistance in other ways. It is sufficient to find, first, that he was present at the place of the crime while another may be striking such fatal blow, and while such blow is being struck he in some way wilfully assists, aids, or abets the crime. In such a case he is made responsible. The law says if he is so present—that is, actually present at the place of the crime—for the purpose of wilfully aiding or assisting or abetting the party who does the thing with his own hand, he is then responsible, he is then a participant in it,
145 because he shows his criminal purpose by being present for the purpose of rendering aid should it become necessary. These two propositions make up what is called real presence at the place of the crime. Now, there is another presence that may affect a party in such a way when coupled with acts or with design as that he is responsible. It is called constructive presence. It is recognized by the law as being so near the place of crime as to enable the party who is so situated to in some way aid, assist, or ab*b*et the commission of the criminal act. And if he does, while so situated, wilfully aid, assist, or ab*b*et it, then he is a participant in it. If he is so situated with reference to it, although it may only be a constructive presence, for the purpose of wilfully aiding, assisting, or abetting the crime, the law says that he is just as criminal as though he had with his own hand done the physical act of violence that produced the death. Now, these propositions of the law are necessary to be given to you to show you how more than one person may be affected by the act done. It shows you what relation he must bear to the act to

make him responsible under the law. In this case if these two defendants, if you find that the crime of murder has been committed, are related to this killing, one by having struck the fatal blow and the other by occupying either one of these relations I have named, that would make them both responsible under the law and both guilty.

Again, we are required to find that this violence was inflicted willfully. That is the first characteristic of the crime of murder—that the act which produced the killing was a willful act. Now, the truth about it is that your common observation tells you better what is meant by
146 that than I can give it to you in a definition, yet the law requires me to define it to you. You have lived long enough, you have observed enough of the acts of men, to know the difference between that which is an accident and that which is willful. The law regards everything as willful that is not accidental. But especially does it regard an act as willful which produces death when that death is produced by the intentional use of a deadly weapon. What is meant by the intentional use of a deadly weapon? That use which is vericied, which is proven, by the very manner in which the man uses it, and that is the way you see it as sensible and intelligent men. You see a man present a gun at another, or any other deadly weapon, and use it in a deadly way, and from the manner of the use of it you come to the conclusion rationally and reasonably that he is intentionally using it; you conclude at once that he intends to produce the deadly result. You know, and he knows, and the man killed, if he is conscious of what is going on as affecting him, knows that the weapon is deadly, and everyone knows, because of the intimate connection between such a use of it and a deadly result, that probably, naturally, and reasonably death may ensue from such use of it. If a man points a gun at you and fires it at you, you become conscious at once that he meant to kill you, and the law says you need not stand any longer before you seek to defend yourself upon the great right of self-defense, because your life has been shown by the conduct of the man to be in deadly danger, to be jeopardised. That principle of self-defense illustrates what is meant by doing a deadly act by another. If a man does a deadly act in that way, or attempts to do it, the common mind rushes to the conclusion at once that he has a deadly purpose.
147 That is just exactly what the law says you may do in the jury box. It says that it is the way you may find that he intended it willfully; the law says that the act was willful which resulted in death, and if you find that that was willful, you are authorized to find that the result, to wit, the death, was willful. If you find that a man intentionally used a deadly weapon, a gun, or any other weapon with which he can easily and readily take life upon another, you have found the proposition which shows that the killing was willful; because intentional, as I have told you, means willful. When you find the act done was willfully done, you find that the result was willful. Let me read to you for a moment a case which to my mind very clearly shows this proposition as to how you may find it was willfully done—as to what is meant by the word "willful," and how you may find it:

"The law recognizes you can not look into a man's mind to find out his intent. You are forced to judge of his intention from his acts. Acting on this principle, the presumption of the law is that a man is held to

have intended the natural and ordinary consequences of his acts. A sane man, a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts."

I have called your attention to the illustration: if you see a man shooting at another, you know that he intends that which is a necessary consequence of what he does, if he is a sane man. Of course, if he has lost his reason and does not know what he does, you would not be authorized to draw such a conclusion; but when you see an act done in that way you are authorized to draw the conclusion that he willfully kills.

148 Now, suppose you do not witness that with your own eyes, but the evidence produced in the case upon which you can depend, although it may be purely circumstantial, in the shape of the character of the wounds, in the shape of the very result called death itself, in the shape of the attempt to conceal the body, in the shape of flight from where the killing occurred, in the shape of the denial of the fact that death ensued at the hands of the parties who may be accused of it, when the proof shows they were the authors of the death—suppose all of these facts are offered before you for the purpose of showing you whether the killing was willfully done or not, as well as to show you whether it was done with malice aforethought, as reasonable men, as sensible men, as men of judgment, as men of large observation in life, what reasonable conclusion do you feel you are authorized to come to as to the manner of the death, as to whether it was willful or not, when such facts are produced before you going to reproduce the occurrence? You will understand that we can not have that terrible tragedy produced actually and really before you, or have the scene enacted here even as it is enacted upon the mimic stage. We can only have it produced before you by the light of the evidence that must come from the eyewitnesses who saw it occur, or it must come from these indubitable and frequently insurmountable facts that stand around the occurrence—a trail, as you may call it, that is left around the occurrence, and which are denominated by the law as circumstances—things that stand around the occurrence; that stand around that which transpires; that stand around the main proposition asserted and sought to be proven in the case. Now, a word further upon this proposition:

"If one voluntarily or willfully does an act which has a direct

149 tendency to destroy another's life, the natural and necessary conclusion from the act is, from the act as done, that he intended so to destroy such person's life."

Now, see what the character of the act is; see what result is produced by it; see what the nature of these wounds are—upon the very part of the body they may be located; and above all, the result that was produced by them, because, in the language of Mr. Justice Field, in a case tried before him while upon the circuit bench in California, "If a man strikes another upon the head with a bar of iron with sufficient force to kill him, it follows as a natural inference, as a reasonable conclusion, that he intended to kill him. If he shoots at another within shooting distance of him with a gun or pistol, because of the nature of the weapon and the manner of the use of it, it follows as a rational conclusion that he intended to kill him. And that is all the evidence for which jurors need

hunt—that is, that the act was intentional, and consequently willful. And whenever the act is found to possess that, the consequence is found to possess a like character—that is, to be willful."

That is the definition of the first element that enters into the crime of murder. That is how you may find it, by the light of these circumstances. It is important to note the meaning of this expression, because it is a characteristic of the crime of murder. It is one of what the law calls the substantive propositions that enter into the crime, and the same evidence frequently which shows the existence of this characteristic of the crime of murder shows the existence of the other one known as malice aforethought, because I say to you that if the proof establishes a
150 willful killing with a dangerous or deadly weapon, such as a gun or pistol, or a bludgeon or blunt instrument, with which life ca' be ca-ily and readily taken, and it shows that these weapons, or either one of them, were willfully used, so as to produce death, and there is nothing offered in the case to show that the party or parties who used them had a right to use them, or that the conduct of the party killed was not of a character that it could be offered before a jury as under the law to reduce the grade of that crime, the very proof which shows it was done willfully shows it was done with a dangerous and deadly weapon intentionally, shows that it was done with malice aforethought. And why? For the reason that the best definition of that expression of malice aforethought is that it is the doing of a wrongful act which results in death without just cause or excuse, or in the absence of mitigating facts.

When we come to look at these principles of law we find they are all based upon what reasonable men infer or conclude. You see one man shoot at another, or you see him strike another with a hammer, or any other blunt instrument, and that other is doing nothing—he is asleep, perhaps—or he is unarmed, he is making no resistance; what conclusion do you come to at once, without knowing a word of law, or of its technical definition? Ever' man who has the consciousness of right and wrong planted by nature in his heart knows that such an act is murder, because he sees that which is a wrongful act, done without just cause or excuse, in the absence of legal provocation or mitigating circumstances. That is the definition of malice aforethought. Or, I repeat, take the case where the killing is shown to be done willfully, and nothing else is shown
151 to justify it, or mitigate it; from the fact that it was done willfully—and especially is that proposition correct when it is done with a deadly weapon with which life can be easily and readily taken—by such means, proves the other element of the crime of murder known as malice aforethought. Another definition of that expression is that it is the taking of a human life so recklessly, so wantonly, so wickedly, as to show that he or they who did it had a heart, or hearts, void of social duty, and a mind, or minds, fatally bent upon mischief. That means that there rests upon all of us great social duties, and the highest and most responsible one that rests upon us is to preserve human life, to protect innocent human life, rather than to destroy it. It is our duty to so far protect it that if we see a fellow-citizen, neighbor, friend, acquaintance, or even a stranger within our gates in jeopardy, his life in danger, and he is innocent, he is unoffending, our duty is to at once rush to his rescue, and to save his life. It is the moral duty of every man, and the great law of

self-defense is in his hands for that purpose, to be executed by him. Now, when we so far forget that duty that we recklessly, wantonally, and wickedly destroy human life without just cause, or in the absence of legal provocation, not only the law, but every proper thinking man, says that that exhibits a heart void of social duty, and the execution of a purpose of that kind shows a mind fatally bent upon mischief. That is another definition of malice.

Now, as was said by the judge before whom the Giteau case was tried, when he was charging the jury upon this special characteristic of the crime of murder, it is not necessary to show any special spite or ill-will to make out this trait of the crime known as malice aforethought. He says:

152 "It must be further shown that it was caused with malice aforethought, but that does not mean that the Government must prove special ill will, hatred, or grudge on the part of the prisoner towards the deceased. Whenever a homicide is shown to be committed without lawful authority and with deliberate intent, it is sufficiently proved to have been done with malice aforethought. And this evidence is not answered, and malice is not disproved, by showing that the accused had no personal ill will against the deceased, but killed him from some other motive, as for the purpose of robbery, or by mistaking him for another, or, as is alleged in this case, to produce a public benefit."

You will remember that Mr. Giteau said he killed Mr. Garfield to produce a public benefit.

It is not necessary that special spite, or grudge, or ill will should be found. Nor is it necessary to show the existence of motive to prove the existence of malice aforethought. It is very difficult to find motive. It is very difficult to find the character of motive. It is hidden in the breast of the party who executes the deed. Frequently it can not be dragged to the light of day at all. We can not discover it, and it would be absurd to say that human life is left in such a defenceless condition as that if we can not find motive we are to stop the wheels of justice, and the guilty are to go unwhipped by it, because motive can not be discovered, for the reason that it is frequently undiscoverable. The law says we need not find it. If we do find it, we simply have another evidentiary fact in the case which goes to show with greater clearness and greater certainty the existence of these elements that enter
153 into the crime, known as that it was done willfully, and done with malice aforethought.

It may not be out of place to detain you a moment upon the rule of the law which says that motive is not necessary, reading from the charge of Judge Langdon, in the case of Billings, tried in a court of New York. He says:

"I speak first of motive. No man commits a crime without some motive leading him to do it. That motive may seem to be strong or weak. You are not to inquire whether the motive is one that ordinarily would lead to the commission of the crime charged. It is difficult for a mind that is fortified by the consciousness of its own rectitude to conceive of an adequate motive for any crime. No motive will lead an entirely just man to the commission of any crime. You could not have a motive to take the life of a fellow-man except in the just defence of

your own lives and rights, or in the just defence of the lives and rights of those who' your duty it is to defend. But just defence is no crime. You may, however, properly inquire what motives do lead men to the commission of crime, and you will find where men's consciences and morals are depraved they are often led into the gravest of crimes by the smallest of motives. A small sum of money, a word spoken in anger, an insult, wrongs real or imaginary, revenge, jealousy, hatred, envy, and malice often lead to the commission of the crime of murder."

Again:

"Crime is rarely logical. Under a government where the laws are executed with ordinary certainty, all crime is a blunder as well as a wrong. If we should hold that no crime is to be punished except
154 such as is rational, then there would be no crime to be punished, for no crime can be found that is rational; the motive is never correlative to the crime, never accurately proportioned to it. Nor does this apply solely to the very poor; very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and kill so that an inheritance might be theirs. When a powerful passion seeks gratification, it is no extenuation that the act is illogical, for when passion is once allowed to operate, reason loosens its restraints."

We are told there very plainly that we need not hunt for motive to show the existence of malice aforethought, or to show the guilt of the parties of the crime of murder. The fact is, if the act of killing is so done as to show, first, that it was done willfully, and then done without just cause or legal provocation, or in the absence of mitigating facts or circumstances, that shows the doing of a wrongful act which results in death, and it shows an act that has in it the characteristic known as malice aforethought.

These are the two elements which go to make up the crime of murder. It is for you to say, first, whether this is a crime because characterised in that way, and that it has been committed by some one, and then whether by the light of the facts and circumstances these defendants are the parties who committed that crime. If these two propositions that go to make the charge set out in this indictment have been established beyond a reasonable doubt, your duty is to convict these defendants as charged in one or the other counts as you may find the character of the instrument used.

155 Now, the law recognizes the fact that we do not always have eyewitnesses to a killing. We do not always have persons called in to witness the taking of a human life in a criminal way. For that reason we are necessarily called upon to resort sometimes to another class of testimony, known as circumstantial evidence. The fact is, that it *it* is universally recognized that among all the important concerns of life, generally speaking, they are all to be established, and to be believed upon the latter-named kind of testimony only. Sometimes there is a concurrence of positive facts and circumstances, when, if they be true, one strengthens the other. Now, these things that are left around an occurrence are things, the law says, that are motiveless. They are inanimate, but, as the great poet says, they sometimes speak with wondrous power, and such wondrous power that we are more readily convinced of the truth of the proposition asserted which is sustained by them than when

it is sustained by the statements of positive eyewitnesses. But it is important to note first what this evidence is, and then to understand its proving power, and then to see whether it exists in this case; and if so, whether the many circumstances offered by the Government ten/ to corroborate the theory as asserted by that Government as represented by its officer, the district attorney. If they tend in that direction, if they are true circumstances, then they may be safely relied upon by you as proving circumstances, or proving facts, going to sustain the proposition involved in this charge. But let us see a little further as to how this character of evidence is regarded in the law, reading from the charge of the court upon the trial of George S. Twitchell, jr., at Philadel-
156 phia, in December, 1868, for the murder of Mrs. Mary E. Hill, his mother-in-law, where Judge Brewster in charging the jury called their attention to this character of evidence and to its proving power. He quotes first from Mr. Bentham, and he says that celebrated English writer tells us "that all evidence flows either from persons or things." That is true. If a man wants to prove a fact, here comes a witness who says he saw it occur. That is positive evidence of it. But suppose he can not get that kind of testimony, and he still wants to establish that fact. He looks to see what circumstances surround the occurrence that he is seeking to have established. He gathers up all of these circumstances, remembering that we can not do anything in this life that we do not leave a trail surrounding what is done. Especially is that true in this age, when nothing can be done by a man that can be hidden or concealed if it is properly examined, so that we are able to understand the nature of the act done and the man who does it from the surrounding facts and circumstances.

"These are the only two sources from which we can expect testimony, and unless we resolve to let all secret crimes go unpunished, all civil disputes to remain undecided, and to throw away our reason, we must act upon the statements of perso's or things. I say statements of things, because if we consult the experiences of every hour we will be taught that inanimate objects have their voice as well as sentient things.

"It is in vain, then, for man to say that because others have failed in their efforts to detect error he will sit quietly down and perversely refuse to apply his intelligence to the problems of life, whether they encounter him in the countingroom or the jury box.

157 "He might just as well refuse to use his legs because others have fallen or been killed in walking. He might with equal propriety refuse to eat because others have been poisoned while partaking of nourishment.

"Some persons, admitting the force of the principle which actually compels us to act upon evidence, still insist that nothing but positive testimony should produce conviction, and adhering tenaciously to this favorite dogma of those who are too timid or too weak to exercise their reasoning faculties with which a kind Providence has endowed them they assail all circumstantial evidence.

"A moment's reflection, however, must satisfy all candid minds of the unsoundness of such a proposition. Suppose for a moment that this was the rule of our being, and that we had been so constituted that we could believe nothing unless it were demonstrated to us by our own sense or by

the statement of an eyewitness, what would then be our condition? Of course we could not punish any crime unless it were perpetrated in the presence of spectators. All secret murders, arsons, burglaries, forgeries, and other offenses could be committed with impunity, nor would the mischief stop here. Few civil controversies could be settled by juries; no book of original entries could be received in evidence; no note or obligation would avail unless there was a subscribing witness—indeed this would not be sufficient, for if he died before trial the claim would expire with him. An insurance on the life of the witness would not even avoid the difficulty, for the policy would die with its attesting witness. For the same reason all receipts would perish with those who saw them
158 signed, and all our deeds and muniments of title would be swept away by the death of the subscribing witness and the magistrates before whom they were acknowledged; all proof of handwriting by comparison be annihilated; commerce would be destroyed or remitted to its infancy in barbarous ages. With the abolition of legal punishment for crime mob laws and vigilance committees would supersede the use of courts and juries, and the whole framework of society would be impaired if not destroyed. The absurdity of the prejudice against circumstantial evidence may be still further illustrated by reflecting for a moment upon the use to which we constantly and properly apply it. Not only do business men answer letters, pay drafts, and credit others to the extent of millions daily upon the testimony of circumstances alone, but they commendably carry this faith, as the evidence of things unseen, into the reasoning which connects them with the world beyond our own. A trifling circumstance, the fall of an apple, has proved to the satisfaction of philosophers the great law of gravitation, which control the motions of the universe. The man who denies the existence of his Maker is properly regarded by many as thereby evidencing his want of reason.

"Yet what proof have we of this important and accepted truth except from circumstances? The same kind of testimony is the proof of our belief in all the great truths of revelation. If we turn from the world without to the great mechanism within us, we see again that no rational man pauses one instant to doubt the force of circumstantial testimony.

"What evidence have we that it is a heart that beats or a brain that throbs within us except from the fact that those organs exist in all
159 similar constituted beings? And we accept remedies for all the ills that flesh is heir to upon precisely the same faith in circumstantial evidence.

"The improvements of modern science furnish us with another illustration. You are in a telegraph office and see the battery in motion. A message is received. The station at the other end of the line may be a thousand miles distant. No human eye saw the subtle fluid pass along the wire, and yet you would hardly listen with patience to the man or the argument undertaking to reason to you that the message might have come through the air or the earth without the agency at the wire, and that all your evidence to the contrary was circumstantial, and therefore unworthy of regard.

"In short, a skepticism like this would open wide the door for the perpetration of secret crimes, would uproot our faith in man, and destroy even our belief in a creator and in a future state.

"These are some of the evils which would flow from the declaration of a principle that we should reject all circumstantial evidence."

Now, then, if we are to ascertain, in the performance of our duties, if a crime has been committed and who has committed it, the fact is that in a majority of cases we must rely solely upon that character of evidence, because frequently it happens that those alone who may be implicated in the crime are the ones that are present at its commission. The one upon whom it is committed of course is inanimate; we can not see him in anyway except as we may look at the gaping wounds or bloody garments, or at some other circumstance that is left around the bloody deed. That is the only use that can be made of him. He can not be brought here and put on the witness stand except in that way,
160 and if we can not rely upon this character of evidence, upon these circumstances that point reasonably and naturally to a probable and safe conclusion upon which we may depend, there is no longer any protection in the power of the law, because the majority of crimes, and especially the worse ones, the most revolting ones, the most wicked ones, are committed when no human eye except the eye of the perpetrator looks upon the crime. Sometimes it is that the eye of an innocent person sees the crime committed, but it generally happens that the other is the true proposition. Then you are authorized to rely upon this sort of evidence in a case of this character. It is your duty to gather up all the facts and circumstances to see what the association of these defendants was with the missing man Vandever; when he was last seen with them, and then when he was discovered as being dead. You are, of course, to see to it that his dead body has been identified as the body of the man who was seen alive and known as William Vandever.

You are to take into consideration all these facts and circumstances. Then you are to go to the evidence and look at any statements that may have been made by the defendants in contradiction of facts established, other testimony that you may find to be reliable. The truth about it is that men's actions, when guilty of crime, are different from those that characterise the actions of innocent men. That is a truism which has been recognized the world over since the day of the first murder, and in that crime, as recorded, there is a very great lesson to be taught us as to how men will deceive, cover up, and deny facts and circumstances that become manifest by the light of the evidence, though it may be circumstantial in its nature.

161 "And Cain talked with Abel his brother: and it came to pass, that when they were in the field, that Cain rose up against Abel his brother, and slew him.

"And the Lord said unto Cain, Where is Abel thy brother? And he said I know not: Am I my brother's keeper?"

Here is a development of human nature in the voice of guilt, in the face of crime, in the face of murder. If a man is innocent of crime he has nothing to conceal. Every fact that surrounds the transaction will protect him if he is innocent. Everything that is true will vindicate the very integrity of his innocence, because the truth is the friend of innocence; it shields and protects it under all circumstances. On the contrary, if it be true that there is guilt, you may naturally look for prevarication, for concealment, for falsehood.

Now, in order to determine whether guilt or innocence exists in this case, you are to take all these circumstances that have been offered, and to see whether truth exists as characterising the declarations of these defendants, or whether falsehood and contradiction exists as characterising their acts. If you find the latter to be the state of case, you are to still look further, and see whether this truth or prevarication, or this concealment or falsehood, has been sustained upon any other theory than that of guilt; because you are to go even that far in looking for innocence, in searching after it, if innocence exists. If it has not, in your judgment, these very contradictions become accusatory facts; they become evidence of guilt, that may be taken into account by you as affecting the defendants.

Now, gentlemen, the law says to you that you are not to expect
162 that a case like this can be demonstrated, can be proven just as you can prove that five and five are ten. That is called demonstration. It is called a mathematical demonstration. It is known as the highest degree of certainty that we can arrive at on earth. We are not expected to accomplish that when we are seeking for conclusions founded upon human conduct, because we can not do it; it is impossible. And while the law commands us to do our duty and uphold it for the protection of its subjects—those who are entitled to protection under it—it does not at the same time require of us impossibilities. If it did, it would be an absurdity. But it says that there is a degree of certainty to which the case must be carried before we are authorized to find it. Now, what degree of certainty is that? It is called proving the respective propositions in the case beyond a reasonable doubt, or so they satisfy reasonable men to that degree of certainty that they would find a conclusion upon a like set of facts, confronted by their solemn duties as citizens outside of the jury box, those facts affecting another than themselves. If in the performance of our duties as citizens our minds are carried to that point, the law recognizes that the impartial, the just, and considerate man believes and acts upon that belief when the possessor of that mind is simply performing the duties of an ordinary citizen. When such citizen comes into the jury box, he is not required to be convinced with any higher degree of certainty than the law of mortals requires his mind shall be convinced outside of it. That is all—in short, that is the proposition of the law, which says that a case must be proven beyond a reasonable doubt.

Now, let us see a moment as to what it means, reading from a
163 case approved by the Supreme Court of the United States:

"A reasonable doubt is a doubt that is based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."

I modify that. I do not think it is exactly fair to parties accused of crime to give it in that shape, although the Supreme Court

approves it, because when we come to consider a case affecting our own important affairs we are not impartial judges; we can not help leaning, naturally and unconsciously it may be, to the side of our interest. It is better, more merciful, and more just to say that when we are so convinced that we would be willing to act upon the more weighty and important matters affecting our fellow-citizens towards whom we can act in an impartial, considerate, and deliberate way, then the rule becomes just, it becomes considerate, it becomes impartial, and a rule that can be safely applied.

Again that court said, in quoting from the case of the Commonwealth v. Costley:

"An instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt has often been held sufficient, without further explanation. In many cases it may undoubtedly
164 be sufficient. It is simple, and, as a rule to guide the jury, is as intellig'ble to them generally as any which could be stated, with respect to the conviction they should have of the defendant's guilt, to justify a verdict against him. But in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension."

Further:

"The instruction is not materially different from that given by Lord Tenterden, as repeated and adopted by Chief Baron Pollock in Rex v. Muller. 'I have heard,' said the Chief Baron, addressing the jury, 'the late Lord Tenterden frequently lay down a rule which I will pronounce to you in his own language: "It is not necessary that you should have a certainty which does not belong to any human transaction whatever. It is only necessary that you should have that certainty with which you should transact your own most important concerns in life."'"

I modify that as I modified the other instruction in that regard.

"No doubt the question before you to-day—involving as it does the life of the prisoner at the bar—must be deemed to be of the highest importance; but you are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life. To require more would be really to prevent the repression of crime, which it is the object of criminal courts to effect."

That is a definition of this expression. It means, not that all doubts must be driven out of the case, because we can't find a proposition in life, and especially a proposition growing out of human conduct,
165 from which you can drive all doubts. There would be skeptical doubts, doubts which were unfounded, doubts which would not satisfy reasonable men, because founded upon mere rumor or conjecture, and these are to be disregarded by the jury; and it is only the doubt for which a good reason can be given, in the light of all the testimony that you find to be true, that is to control your minds in making up your judgment in matters of this importance.

Now, gentlemen, the kind of testimony that is sufficient to authorize you to convict is that which is equal in proving power to the testimony of one positive, credible, uncontradicted eyewitness. Now, that does not mean that there must have been somebody standing behind a tree below Mr. Brown's house who saw this shooting or saw the defendant

commit it. It does not mean that, but it means if all the facts and circumstances which are inculpatory, which have a tendency to show guilt, when viewed as being true, when they are properly proven before you, when their probable proving power is weighed and taken in consideration by you—if they are all equal in proving power to what would be the testimony of one positive, credible, uncontradicted eyewitness, the law says the case is established; it is made out, because it is carried beyond the point of a reasonable doubt.

You are the judges of the credibility of the witnesses and of the circumstances in the case. The defendants have gone upon the stand. They stand before you as defendants. You are to take their statements and weigh them, deliberate upon them, in the light of the facts and circumstances in the case. If the other facts corroborate what they
166 say, they are strengthened. If they contradict what they say, they are weakened. You are to be guided by the light of the testimony you find to be true.

I say to you, in conclusion, if there is enough of that kind of evidence in the case made up of all these circumstances in the shape of the conduct or declarations or contradictions, if you find any existing, made by the defendant'—if all the evidences of crime existing in the case satisfy your minds beyond a reasonable doubt of guilt, you will say under which count of this indictment you will find the defendants guilty of murder. If that state of case is not established so that the jury are so satisfied, you will say, We, the jury, find the defendant not guilty as charged in the indictment.

Gentlemen, you will retire and make up your verdict.

5.20 p. m.

* * * * * * *

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE PIERCE AND JOHN PIERCE, plaintiffs in error, v. THE UNITED STATES.	No. 648.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE PIERCE AND JOHN PIERCE, plaintiffs in error, v. THE UNITED STATES. } No. 648.

MOTION TO ADVANCE.

The plaintiffs in error, white men and not Indians, were indicted in the circuit court of the United States for the western district of Arkansas for having murdered one William Vandever, a white man and not an Indian, at the Cherokee Nation, in the Indian country, on the 15th of January, 1895. They were tried and on March 1, 1895, found guilty and sentenced to be hanged.

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the term as may be convenient to the court.

Notice of this motion has been served on the plaintiffs in error and their counsel in the court below, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

Office Supreme Court U. S.
FILED.
NOV 19 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE PIERCE AND JOHN PIERCE, plaintiffs in error,
v.
THE UNITED STATES.
No. 648.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE PIERCE AND JOHN PIERCE, plaintiffs in error, v. THE UNITED STATES. } No. 648.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

George Pierce and John Pierce, plaintiffs in error, were indicted for the murder, on January 15, 1895, at the Cherokee Nation, in the Indian country, of one William Vandever. There are two counts in the indictment. The first charges the murder to have been committed with a gun, and the second charges that it was committed "with a certain blunt instrument." The jury found both defendants guilty of murder as charged in the first count, and they were accordingly both sentenced to death on June 5, 1895.

THE RECORD.

This was one of the voluminous records customarily sent up from the western district of Arkansas. Examination showed that the entire bill of exceptions contained two exceptions and that nearly all of the matter included was absolutely immaterial. For this reason, in accordance with the written request set forth at page 7 of the record, the clerk, by leave of court, omitted the bill of exceptions and substituted therefor a short statement prepared by the undersigned. Two passages in this statement are *verbatim* quotations from the original bill of exceptions (which bill is a carbon copy of the stenographer's minutes). These quotations follow the words "MS., page 16" on page 7 of the printed record and "MS., pages 19–21" on page 8. The quotations end immediately before the words "Witness further testified" in each case. The other matter printed at pages 7–9 under the head "Bill of exceptions" is an abstract prepared by the undersigned.

ASSIGNMENTS OF ERRORS.

We take up the assignments of errors separately.

I. It is claimed that the court erred in overruling the demurrer to the second count in the indictment. This demurrer is perhaps intended to raise the same question which is raised by the demurrer in the case of *Charles Smith* v. *United States*, No. 608 of this term, and discussed in the briefs in that case. It is, however, entirely immaterial in the present case, because the defendants are found guilty under the first count only.

II. It is claimed that the court should have granted defendants' motion to compel the Government to elect between the two counts of the indictment. One of these charged murder with a gun; the other charged murder with a blunt instrument. The motion was made before the commencement of the trial (p. 3). Testimony was introduced on the trial tending to show that the dead man had been shot in the forehead and also hit on the head with a hammer; and the motion to compel election was not renewed (p. 9). The motion was addressed to the discretion of the court. (*Pointer* v. *United States*, 151 U. S., 396.)

III. Certain testimony is objected to as hearsay. This point is purely trivial. In proving the *corpus delicti* the first witness, Andrew Brown, described his search for the body in company with a Mr. West, and in the course of his description of the search stated that Mr. West picked up a blanket and something like a pint of blood ran out of it. He then proceeded as follows:

> He just dropped it and said, "Brown, what kind of blood is that?"
>
> Mr. BYRES (of counsel for defendant). Never mind that.
>
> The COURT. I think that is competent. It is a verbal fact that occurred at the time they were looking, just as much as what they saw.
>
> Mr. BYRES (of counsel for defendant). We just reserve an exception.
>
> The WITNESS. I said: "I don't know what kind of blood it is. It is blood." He says: "Maybe they have killed one of my hogs." I says: "We will see" (pp. 7, 8).

It was relevant to prove just how the body was found, so as to establish the *corpus delicti*. It is impossible to keep the average witness from introducing in his testimony the conversation which he remembers as part of the *res gestæ*. The conversation is, in fact, part of the *res gestæ* (Whart. Crim. Ev., § 262), and the extent to which the witness is to be restrained is within the discretion of the trial judge. (1 Greenleaf on Ev., § 108.)

IV. Error is claimed "in admitting the statements made by the defendants when they were under arrest and handcuffed and at a time when they were too much scared as to be conscious of what they did say."

This assignment of error is based upon no exception, and therefore is unavailable.

Careful search through the bill of exceptions discloses nothing to which this might relate, unless it be the extract at pages 8 and 9 of the printed record, where defendants' counsel raised the point as to the admissibility of confessions which is discussed in *Hopt* v. *Utah* (110 U. S., 574), *Sparf* v. *United States* (156 U. S., 51, 55), and *Hardy* v. *United States* (3 D. C. App., 35). That counsel took no exception is doubtless due to the fact that no confessions were proved. The testimony as developed by the witness showed merely that the prisoners acted in a suspicious manner when first arrested, saying: "If we killed him, you prove it," and "that is for us to know and you to find out;" and that they refused to tell their names. The testimony was thus admissible within the

rule clearly stated by Mr. Abbott, as follows (Abbott's Trial Brief in Criminal Cases, § 560):

> Evidence of the demeanor of the accused soon after the commission of the offense, or at the time of his arrest, is competent as bearing upon the question of his consciousness of guilt.

Mr. Abbott cites *Greenfield* v. *People* (85 N. Y., 75). We may cite further *People* v. *Conroy* (97 N. Y., 62, 80); Wharton's Crim. Ev., § 679; 1 Bish. Crim. Proc., § 1254.

V. It is claimed that the court "erred in its declarations of the law to the jury;" but this is immaterial, since there was no exception (*Tucker* v. *United States*, 151 U. S., 164, 170), and even an exception would have been unavailable when taken to the charge as a whole. (*Holder* v. *United States*, 150 U. S., 91.)

VI. Counsel excepted to the denial of a motion for a new trial, based on the grounds, among others, that the verdict was contrary to law and to the evidence. This exception also is unavailable. (*Holder* v. *United States*, *supra*; *Moore* v. *United States*, 150 U. S., 57, 61; *Martinton* v. *Fairbanks*, 112 U. S., 670, 674.)

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney General.